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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC., *Petitioner*
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*

v.

LARRY G. HARDISON, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

AND

BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *AMICUS CURIAE*

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MOTION OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The General Conference of Seventh-day Adventists respectfully moves this Court for Leave to File in this case the accompanying Brief as Amicus Curiae. The

consent of the Attorney for the Petitioner, International Association of Machinists and Aerospace Workers, herein has been obtained, and the Attorney for the Respondent Larry G. Hardison has also given his consent to the filing of such a Brief. However, the petitioner, Trans World Airlines, Inc., has indicated that it would neither object nor consent to the filing of such a brief.

The Applicant, General Conference of Seventh-day Adventists, has significant interest in this case on behalf of its individual church members, who number in excess of 470,000 in the fifty States and the District of Columbia. The issues before this Court arise out of the observance of a religious tenet and a charge of religious discrimination filed under the Equal Employment Opportunity Act.

Throughout the United States there are a significant number of religious discrimination cases involving members of the Seventh-day Adventist Church pending in both federal and state courts. The decision in this matter will directly affect the outcome of those cases.

In addition, the developing law to which this case is addressed will affect the future employment opportunities of all Sabbatarians. The Seventh-day Adventist Church has, therefore, a vital interest in this matter.

The Brief of the Applicant herein is directed toward the interests of the Respondent. Applicant, however, believes that the impact of this case as it affects members of the Seventh-day Adventist Church and other Sabbatarians is not adequately presented by the Petitioner. The concern of the Seventh-day Adventist Church for the substantial number of its members affected by the holding in this case prompts the filing of this Motion.

Respectfully submitted,

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BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is a religious denomination whose membership follows the command of the Bible that the Sabbath, the Seventh-day, be set aside from work and other worldly endeavors.[1] The respondent here is a

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[1] The observance of the Sabbath for Seventh-day Adventists is

member of another denomination observing the Sabbath. The interest of the *amicus curiae* in the outcome of the case is obvious. Petitioners have argued that national laws and regulations intended to require employers to accommodate the religious needs of employees, including those who observe the seventh day as holy, are unconstitutional or should be construed in an unduly limited way. Adherents to the religious tenets of this denomination, as well as others who observe a day of rest because of their religious beliefs, will be directly affected by the judgment of the Court in this case.

QUESTIONS PRESENTED

1. Does the requirement of the 1964 Civil Rights Act that employers make reasonable accommodations to the religious needs of their employees constitute an

---

by no means an arbitrary, mechanical, ritualistic practice. Rather, they see a mandate for the Sabbath in the fourth of the Ten Commandments, where it is portrayed as a specific weekly memorial to the creative power of God and as the believer's invitation to a particular and personal fellowship with God (Exodus 20:8-11). As suggested by Deuteronomy 5:12-15, the observance of the Sabbath is a symbol also of man's creation in the image of God with the dignity of free choice and freedom from servitude.

We view the Sabbath as the day carefully observed by the man Christ Jesus and released by Him, as Lord of the Sabbath day, from the demeaning encrustations of human traditions (Luke 4:16; Matthew 12:1-13, Mark 2:27, 28). Also, as indicated in Hebrews 4, the Sabbath rest is both a symbol of the Christian's deliverance from the bondage of sin by the redemptive and creative power of Jesus Christ and of rest from his unavailing effort to earn salvation by the merit of his own works. More than a recommended religious practice, the observance of the Christian Sabbath is, for Seventh-day Adventists, a sign of the restored harmonious relationship between the believer and his Creator-Redeemer (Ezekiel 20:12).

"establishment of religion" forbidden by the First Amendment?

2. Is the regulation of the Equal Employment Opportunity Commission requiring reasonable accommodation a proper implementation of the purpose of the 1964 Civil Rights Act?

3. Did Trans World Airlines, Inc., improperly fail to make a reasonable accommodation to Larry G. Hardison's religious need to avoid work on his Sabbath?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION INVOLVED

Constitution

Article 1, Section 8 provides: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states...."

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

The Fourteenth Amendment, Sections 1 and 5, provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law...." "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Statutes

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides:

> —It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . . 42 U.S.C. § 2000e-2(a)(1) (1974).

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j) (1974).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . . 42 U.S.C. § 2000e-2(h) (1974).

Section 703(c) of the Civil Rights Act of 1964, as amended, provides:

It shall be an unlawful employment practice for a labor organization—

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportuni-

ties, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. 42 U.S.C. § 2000e-2(c) (1974).

Regulation

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides:

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious belief, the

employer has the burden of proving that an undue hardship renders the required accommodation to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people. 29 C.F.R. § 1605.1 (1975).

STATEMENT OF THE CASE

It is not necessary in this *amicus curiae* brief to recite all possibly relevant facts, but we do summarize those that appear to be crucial.

Larry Hardison, the respondent, was employed by Trans World Airlines, Inc. ("TWA") at its overhaul base in Kansas City, Missouri. His job at the Stores Department included the delivery of parts and materials to mechanics for the purpose of repairing, maintaining, and overhauling aircraft and engines (A. 23).[1] While working in Building No. 2, in March, 1969, he found a conflict between his work schedule, which demanded Saturday work for at least two weeks, and his religion, the Worldwide Church of God, which proscribed work on the Sabbath, i.e., between sundown Friday and sundown Saturday. Hardison met with the manager of the Stores System, Everett Kussman, who represented TWA, and with James Tinder, a shop steward of District 142 of the International Association of Machinists and Aero Space Workers (the "union"). A number of possible accommodations were discussed. Hardison was willing to work a four-day

[1] Reference to "A. ——" is to the Appendix filed in this Court.

week or a six-day week (A. 71). Although more than 200 men were capable of performing Hardison's work (A. 134), TWA rejected the four-day alternative because the company would then have had either to utilize a supervisor or an employee responsible for another job to perform Hardison's duties or to pay overtime to another employee to take Hardison's place (A. 125, 146). TWA also rejected the six-day alternative because, under the collective bargaining agreement, that alternative apparently was barred by the 40-hour per week clauses (A. 71). A third alternative was that someone might voluntarily swap days off or regular shifts with Hardison. Hardison indicated that another employee unhappy with his shift was willing to change shifts with him (A. 83-84, 110). Kussman had no objection to a swap, but neither he nor any other TWA representative made any effort to implement a swap or requested the union to accept a swap, which apparently was thought to be inconsistent with the terms of the collective bargaining agreement (A. 157, 238). The union took no steps to work out any swap of shifts or days off (A. 158, 238). An alternative that apparently was not discussed was that someone of greater seniority might actually be assigned to work on Saturdays with Hardison assigned to work on other days. This alternative was also barred by the collective bargaining agreement. Thus, no accommodation was offered to Hardison that would have relieved him of Saturday work. He subsequently did not report for work on successive Saturdays. In order to minimize the conflict with his religious beliefs, Hardison switched to a twilight shift that included Friday afternoon and evening work; he left work once at sundown on Friday, the time his Sabbath began (A. 170-71). He was then discharged for insubordination.

Because the sole basis for Hardison's discharge was his failure to work during his Sabbath, and TWA and the union had failed to make any accommodation that would have permitted him to refrain from Sabbath work and keep his job, Hardison filed an unlawful employment practice charge with the Equal Employment Opportunity Commission. He claimed that TWA and the union had failed to meet their statutory duty to refrain from religious discrimination under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), 2(c), a duty that had been interpreted by an EEOC regulation to require employers "make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1975). When administrative remedies had been exhausted, Hardison brought this action against TWA and the union in the district court, which held that no statutory violation had occurred. 375 F. Supp. 877 (W.D. Mo. 1974). Hardison then appealed to the court of appeals for the Eighth Circuit, 527 F.2d 33 (1975). Considering the lower court's judgment in favor of the union not to be "directly challenged upon appeal," the court of appeals did not pass on its propriety. It reversed the district court's judgment in favor of TWA, holding unanimously that TWA had violated Title VII of the Civil Rights Act by failing to make reasonable accommodation and further holding that the reasonable accommodation requirement was constitutional.

SUMMARY OF ARGUMENT

I

The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2a (1974), bars discrimination in employment because of an individual's religion, and a 1967 Regulation of the

EEOC, 29 C.F.R. § 1605.1 (1975), interprets the Act to require employers to make reasonable accommodations to the religious needs of employees and prospective employees, so long as those accommodations do not impose undue hardsip on the conduct of their businesses. The only constitutional issue in the case is whether the "reasonable accommodation" requirement violates the Establishment Clause of the First Amendment. Nevertheless, an understanding of the sources of Congressional power helps to clarify the relevancy of the Establishment Clause. Both as a means of attacking intentional discrimination and as an additional method of promoting equal employment opportunity, Congress may under the Commerce Clause bar practices that discriminate in effect on religious grounds, as well as practices that discriminate in effect on racial grounds. It may, therefore, properly require employers to make adjustments in work schedules to accommodate claims of religious conscience. Congress also has power to require reasonable accommodation under the First and Fourteenth Amendments. It may forbid private religious discrimination that is largely the product of government action. Both the work schedules of state and federal government agencies and Sunday Closing laws significantly influence work schedules in the private sector. Congress may ameliorate the harmful indirect effects on Sabbatarians and others of these government laws and practices by requiring private employers to make reasonable accommodations.

The reasonable accommodation requirement does not violate the Establishment Clause. This requirement is not arbitrary since a factual showing that the "accommodation" will produce "undue hardship" on the employer is sufficient to render this statutory obli-

gation unreasonable. To impose a statutory guideline sensitive to individual conscience and protective of the "free exercise" of religion is not presumptively "establishment" of religion. It does not share any of the characteristics of practices which this Court has held to be an establishment of religion. The government is not supporting one religious belief in preference to another or all religious beliefs in preference to irreligion. In barring practices that in effect discriminate against persons with particular religious views, it does in a sense aid those who would otherwise suffer discrimination but this hardly constitutes support. Rather, the government promotes the constitutional value of voluntarism.

Reasonable accommodation does not interfere with the religious liberty of employers or other employees. Nor does it force them to support any religion. Some, though not all, required accommodations undoubtedly require the employer to bear some cost, but no financial benefit is conferred on the employee who needs accommodation or on his church. The cost an employer may bear to eliminate discrimination in effect on religious lines is similar to the cost he may bear under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to eliminate discrimination on racial lines. It is taken for granted that a straight ban on intentional racial discrimination is constitutional, even though an employer may also have to bear costs to prevent such discrimination. Thus, it is plain that employer costs do not constitute forbidden support of the religion of employees who would otherwise suffer religious discrimination. For similar reasons, the fact that some other employees, as a consequence of reasonable accommodation, may have work

schedules slightly less desirable than the ones they would otherwise have does not mean these employees are being forced to support the religion of the employee who needs accommodation.

Despite petitioners' claims to the contrary, the requirement of reasonable accommodation does not impermissibly prefer religion over irrelegion or one religion over another. The benefits of the act are by no means limited to members of particular religious groups, and they have been extended even to atheists, since the EEOC, properly, is using a broad definition of religious need drawn from the conscientious objector cases. Even if the requirement benefited only religious believers, it would be a permissible accommodation to religious conscience under the Free Exercise Clause. Petitioners place great stress on the fact that the requirement does favor those with religious claims not to work on particular days as compared with those who for personal reasons would prefer not to work on certain days. Such a distinction is undeniably drawn, but it is well established that the government may treat those who are conscientiously opposed to performing certain acts differently from those who for nonconscientious reasons would wish not to perform them.

The court of appeals correctly held that reasonable accommodation does not violate the threefold test of establishment as formulated in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-73 (1973). That test, if it is to apply to all establishment cases, must be read flexibly to incorporate the complex interplay of relevant constitutional values, including permissible accommodation to the free exercise of religion. The elimination of discrimination in effect along re-

ligious lines, a part of a general congressional purpose to eliminate various types of discrimination, is a clearly secular purpose under any understanding of the *Nyquist* test. The main effect of eliminating such discrimination neither advances nor inhibits religion. It is true that attacks on discrimination benefit members of groups that would otherwise be discriminated against, but this effect is an inevitable, indirect, and remote consequence of eliminating discrimination, associated in precisely the same way with bans on intentional religious discrimination as with required accommodation.

Even if relief of burdens on religious exercise were regarded as the main purpose and effect of reasonable accommodation, the requirement would be constitutional. This Court has held that such a purpose and effect is a permissible basis for excusing conscientious objectors from military service, *see, e.g. Gillette v. United States,* 401 U.S. 437 (1971), and is a required basis for relieving Amish children of school attendance obligations, *Wisconsin v. Yoder,* 406 U.S. 205 (1972). More relevantly, the Court has indicated that Sabbatarians may be exempted from Sunday Closing laws, *Braunfeld v. Brown,* 366 U.S. 599 (1961), and that they must be allowed unemployment compensation though unavailable for Saturday work. *Sherbert v. Verner,* 374 U.S. 398 (1963). In each instance, relief from burdens on religious exercise was a main purpose and effect of permitted or required accommodation. Such relief obviously is not always rendered unconstitutional by the *Nyquist* test. Given the holding of *Sherbert,* it must be permissible for the government to accommodate its own work schedules to the religious needs of its own employees. In terms of secular pur-

pose and primary effects that neither advance nor inhibit religion, a government requirement that private employers similarly accommodate is indistinguishable.

Reasonable accommodation does not produce excessive entanglement of government with religion. No continued government monitoring of religious institutions is involved. The government does stand ready to resolve disputes between employers and employees, but most disputes that have arisen under the Act have involved only the question of how much hardship the employer must undertake, not a religious question at all. Occasionally the EEOC and courts may have to decide if a claim is "religious" or sincere, but not nearly so often as was required in the administration of the conscientious objector program. Indeed, since it need deal only with unresolved disputes, the government's involvement will be markedly less than is needed to administer reasonable accommodation to its own employees.

Nor will reasonable accommodation promote divisiveness; quite the contrary. Even if occasional individual resentment could rise to the kind of political divisiveness that has worried the Court, the requirement of reasonable accommodation eliminates a much more significant source of divisiveness-employment practices that discriminate in effect along religious lines and thus invite agitation along those lines in opposition or support of existing practices.

II

The EEOC requirement of reasonable accommodation properly reflects Congress' intent in enacting Title VII of the 1964 Civil Rights Act. That require-

ment serves the Congressional aim of ending discrimination; is entitled to the deference due agency judgment; is consonant with this Court's treatment of practices discriminating in effect on racial lines, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971); and has been unqualifiedly endorsed by a Congressional amendment clarifying the original statutory meaning.

TWA failed to make a reasonable accommodation to Hardison's religious needs. It did not actually offer him any accommodation that would have resolved his conflict between work schedule and religious belief, and it failed to show that possible accommodations would have imposed undue hardship on the conduct of its business. The points on which the court of appeals disagreed with the district court concerned the interpretation of the key terms of the applicable legislative standard and the kind of evidence needed to satisfy an employer's burden of proving undue hardship. These are obviously matters on which an appellate court reviews a trial court, and the court of appeals correctly rejected the district's courts unduly weak reading of the reasonable accommodation requirement.

TWA failed to make accommodations that were reasonable but which may have varied from the terms of its collective bargaining agreement with the union. It failed even to encourage the union to agree to a variance. Under the Civil Rights Act a union may be responsible for causing an employer to discriminate. The employer and union cannot join together to write a broad, rigidly formulated, collective bargaining agreement that will bar reasonable accommodations, and then refuse to permit variances. Section 703(h) of the Civil Rights Act of 1964, which concerns bona fide seniority systems, does not affect this conclusion.

That section was not intended to define which practices constitute present violations of the main statutory provisions. Seniority arrangements that lead employers to discriminate cannot be a basis for excusing the discrimination. Although collective bargaining agreements may create employee expectations, these expectations do not override powerful statutory policies, especially when, as in this case, accommodations are possible that would not defeat any significant expectations.

TWA did not take steps to require a switch in shift assignments to accommodate Hardison or even to ascertain if some other employee wished to make a voluntary switch. The vague potentiality of employee resentment, a union grievance, or other claims of religious need obviously did not amount to a showing of undue hardship.

Even if it were decided, incorrectly in our view, that an employer is not required to take steps varying from the terms of the collective agreement without union consent, still TWA failed to fulfill its statutory duty. At the very least, it should have positively encouraged union consent to a variance, especially since the Union Relief Committee did recommend variances for special family and health reasons, and a voluntary switch of shifts would have defeated no substantial employee expectations. TWA did not take a single step to encourage the union to agree to a variance.

The statutory framework which recognizes collective bargaining as an instrument of industrial and labor peace is a creation of Congress. A contractual product of the bargaining process cannot be presumed to constitute a bar to subsequent Congressional action protective of First Amendment or other Constitutional mandates. The Civil Rights Act of 1964 in its original form and as

amended reflects a clear Congressional intent to enhance Constitutional guarantees in commerce including application to the collective bargaining system previously given statutory recognition by Congress.

TWA also failed to meet the reasonable accommodation requirement by refusing to make accommodations that were consistent with the collective bargaining agreement. It refused to pay another worker overtime to fill Hardison's slot when he was scheduled for Sabbath work, yet this cost was plainly manageable. Despite some conclusory observations about the problems of relying on employees who fill in, TWA failed to show that its work would be at all impaired by such an arrangement. It also refused to have Hardison's work done by another employee on duty or by a supervisor. Although Hardison had actually been absent three Saturdays in a row and TWA, therefore, had ample experience with what the impact of his absence was, it failed to provide any detailed evidence of how its operations would be harmed if someone were required to cover for him. The court of appeals correctly concluded that TWA had not carried its burden of proving undue hardship.

Petitioners' position seems to be that an employer is not required to undertake on its own or even encourage union agreement to cost-free accommodations that vary from the terms of collective bargaining agreements, nor is an employer required to undertake any accommodation that imposes some costs on it. Petitioners must be right about both points for the conclusion to be reached that TWA met its statutory duty. Since petitioners' interpretation of the "reasonable accommodation" requirement would almost totally vitiate a significant guarantee of equal employment opportunity, it is unacceptable. It follows that TWA plainly failed to satisfy the reasonable accommodation requirement.

ARGUMENT

I

A Congressional Requirement That Employers Make Reasonable Accommodations To The Religious Needs Of Employees Is Within The Legislative Powers Of Congress And Is Consistent With The Establishment Clause Of The First Amendment.

A. Congress May Require Reasonable Accommodations to the Religious Needs of Employees Under Its Power to Regulate Foreign and Interstate Commerce and Under Its Power to Enforce the First and Fourteenth Amendments.

This case directly involves Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2a (1974), which bars discrimination in employment because of an individual's religion, and a 1967 Regulation of the Equal Employment Opportunity Commission, 29 C.F.R. § 1605.1 (1975), which interprets the 1964 Act as requiring employers to make reasonable accommodations to the religious needs of employees and prospective employees, so long as these accommodations do not impose undue hardship on the conduct of the employer's business. The only constitutional challenge to the reasonable accommodation requirement thus imposed is based on the claim that it violates the Establishment Clause of the First Amendment. Petitioners have not doubted that in the absence of this constitutional limit, Congress would have the power to impose such a requirement on employers covered by the Act. Nevertheless, we believe a summary discussion of the sources of Congressional power is useful because it will help clarify the relevancy of the Establishment Clause.

1. *Congress Has Power Under the Commerce Clause to Require Accommodation to Religious Needs of Employees.*

It is unquestioned that the Congress under its authority to regulate commerce with foreign nations and among the several states, Art. I, § 8, may ban intentional religious discrimination by employers like TWA whose businesses affect commerce. Congress has extensive power to control the incidents of employment of firms that affect commerce. Discrimination that excludes members of racial or religious groups from employment or disadvantages them in conditions of employment touches not only the particular firms involved but also the general course of commerce. *Cf. Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 379 U.S. 294 (1964).

The reasonable accommodation requirement is, among other things, a proper means of carrying out a policy against intentional discrimination. If Title VII had barred only intentional religious discrimination, an employer who wished to discriminate could do so by erecting facially neutral work schedules which, in fact, excluded members of particular religions. In theory, of course, it would be open to an employee to prove a discriminatory motive, but often that would be difficult and almost always it would be expensive and time-consuming. Requiring reasonable accommodation to the religious needs of employees avoids the difficulty of forcing an employee to prove improper motive in each case, and thus makes effective a policy against intentional discrimination. That Congress may choose appropriate means to accomplish permissible ends and that the courts will accept Congressional determinations about the necessity of its chosen means are long established constitutional principles. *See McCulloch*

v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). It is also well established that Congress may, in order to make a regulation of interstate commerce effective, decide upon practical classifications that reach some transactions beyond those that are the primary subject of its concern. *See, e.g., United States v. Darby,* 312 U.S. 100, 121 (1941); *Perez v. United States,* 402 U.S. 146 (1971). Even if Congressional power were limited to the abolition of intentional discrimination and the religious accommodation requirement reached some situations in which no intentional discrimination had occurred, the requirement would still be an entirely appropriate means of attacking religious discrimination. *Cf. South Carolina v. Katzenbach,* 383 U.S. 301 (1966).

The religious accommodation requirement can also stand on its own feet as barring employment practices which, though not the product of intentional discrimination, in effect discriminate against members of certain religions. Sometimes these practices may reflect simple judgments about convenience and efficiency, but often these practices reflect a kind of religious prejudice that is much more subtle and less self-conscious than purposive mistreatment of those of differing religious faiths. *Cf.* Brest, *The Supreme Court, 1975 Term —Foreword: In Defense of the Anti-discrimination Principle,* 90 Harv. L. Rev. 1, 14 (1976).[3] Under its

[3] A supervisor may fail to accommodate the needs of Orthodox Jews or Moslems in their work schedules not because he intends to discriminate on religious grounds, but because he somehow regards persons who make such unusual requests as "oddballs" or insincere, potential troublemakers he would do well not to encourage. Because people find it hard to identify sympathetically with those who seem "different," persons whose religious needs mark them as unusual suffer in ways much more complex than overt, self-conscious religious discrimination.

commerce power, Congress may regulate not only practices of intentional discrimination but also practices that have a disproportionate disadvantageous impact on members of particular groups. These may be an important aspect of the employment practices of particular employers and, like intentional discrimination, they can have an important effect on commerce by significantly affecting employment relations and opportunities for employment. Congress may proscribe "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In holding that Congress had required the removal of "unnecessary barriers to employment" that operate "to discriminate on the basis of racial or other impermissible classification," whether or not the barriers were the product of intentional discrimination, 401 U.S. at 431, 432, this Court, in *Griggs*, found it unnecessary even to discuss the question of constitutional authority, deeming it obvious that Congress had the power to reach such practices. Thus, there can be no doubt that Congress has the constitutional power under the Commerce Clause to require reasonable accommodation unless it is precluded from doing so by a specific constitutional limitation.

2. *Congress May Require Reasonable Accommodation Under Its Power to Enforce the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteen Amendment*

Under the enforcement clause of the Fourteenth Amendment, Congress may prohibit activities which are not directly forbidden by Section 1 or other sections of the Amendment. *See Katzenbach v. Morgan,*

384 U.S. 641 (1966); *United States v. Guest,* 383 U.S. 745 (1966) (concurring opinion of Clark, J., and dissenting opinion of Brennan, J.). The religion clauses of the First Amendment have been made applicable against the states by the due process clause of the Fourteenth Amendment, *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Everson v. Board of Education,* 330 U.S. 1 (1947), so Congress's power to enforce the Free Exercise Clause includes the power to deal with religious discrimination. Under the Necessary and Proper Clause, Art. 1 § 8, Congress also has power to pass legislation enforcing the religious guarantees of the First Amendment itself.

It may well be that under section 5 of the Fourteenth Amendment, Congress has the power to forbid any private religious discrimination that is not itself constitutionally protected (as, for example, is the right of a church to select a pastor on religious grounds). Six justices in *United States v. Guest, supra,* endorsed the proposition that Congress may forbid some forms of private interference with private activity when that interference is based on racial animosity. Although the opinions in that case discussed private interferences with private attempts to use public facilities, the constitutional principle can not sensibly be limited to the use of public facilities. *See Cox, The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. 91, 115-119 (1966). A number of courts of appeals, relying on *Guest and Griffin v. Breckenridge,* 403 U.S. 88 (1971), have concluded that section 5 of the Fourteenth Amendment grants Congress broad power to reach private discriminatory acts, whether or not use

of public facilities is involved.[4] For example, in *Action v. Gannon, supra* note 4, a case in which state facilities were in no way involved, the court held that 42 U.S.C. § 1985(3) reaches organized private disruption of religious services, and that such coverage is constitutional. The court said that Congress has "the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by states." 450 F.2d at 1237. If Congress can permissibly forbid the disruption of services involved in *Gannon,* it can also forbid religious discrimination in employment and require reasonable accommodation to religious needs.

Although we believe the approach of *Action v. Gannon* and similar cases to be sound and applicable to this case, we do not develop the point further because a much less sweeping and much less debatable approach demonstrates the appropriateness of requiring reasonable accommodation as a measure to enforce the First and Fourteenth Amendments. Such a requirement is a proper means of ameliorating the effects of government action that inhibits the free exercise of religion.

Certain laws and government practices have the effect of inhibiting the free exercise of religion. Sunday Closing laws, for example, although not unconstitutional, *McGowan v. Maryland,* 366 U.S. 420 (1961); *Braunfeld v. Brown,* 366 U.S. 599 (1961), do undoubtedly place a special burden on the exercise of religion of those whose faith requires them to abstain from

[4] *See Westberry v. Gilman Paper Co.,* 507 F.2d 206, *vacated as moot,* 507 F.2d 216 (5th Cir. 1975); *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971); *Richardson v. Miller,* 446 F.2d 1247 (3d Cir. 1971).

work on some day other than Sunday. The government, though it need not, may appropriately take steps to relieve these burdens. Just as it may exempt conscientious objectors from military service, *see, e.g., Gillette v. United States,* 401 U.S. 437, 453 (1971), so also may it exempt Sabbatarians from Sunday Closing laws. *See Braunfeld v. Brown,* 366 U.S. at 608; *McGowan v. Maryland,* 366 U.S. at 520 (separate opinion of Frankfurter, J.). Missouri is one of many states with a Sunday Closing law, Missouri Revised Statutes § 563.721 (1969), and, as in all states, most of its government offices are themselves closed on Sunday. Many private businesses throughout the country that are not compelled to close on Sunday will choose to shut down completely on that day or to operate on less than full scale; that decision will be largely influenced by the fact that many other private firms are compelled to close and by the fact that virtually all government offices are closed. Even the decision of many states to exempt Sabbatarians from Sunday Closing law requirements inhibits the religious exercise of those who worship on Sunday but work, or seek work, with employers who rely on the exemption to remain open on Sunday and insist that employees work that day. *Cf. Braunfeld v. Brown,* 366 U.S. at 609.

Both state and federal governments are very much implicated in the work schedules of most private firms; therefore, the disadvantages that Sabbatarians and others suffer in respect to employment are significantly the product of government action. Congress could perhaps solve the problem by abolishing all Sunday Closing laws, keeping federal offices open on Sunday and requiring state agencies to do the same. But then the benefits of a uniform day of rest would be

sacrificed, *see McGowan v. Maryland, supra; Braunfeld v. Brown, supra,* and many Sunday worshipers might be inconvenienced. Instead, Congress has moderated the burden on religious exercise created indirectly by government actions, by requiring private employers to accommodate to the religious needs of their employees. *Katzenbach v. Morgan, supra,* establishes that Congress need not attack impairments of constitutional rights directly. The first theory of that opinion assumes that New York's English literacy test was itself constitutionally unassailable but that the test could be abolished as an indirect means of counteracting discriminatory treatment in public services. 384 U.S. at 651. Required religious accommodation by private employers counteracts one important effect of government action that burdens the free exercise of religion, and is, therefore, within Congress's power to enforce the guarantee of religious freedom protected by the First and Fourteenth Amendments.

B. The Requirement That Employers Make Reasonable Accommodations to the Religious Needs of Employees Does Not Violate the Establishment Clause of the First Amendment.

1. *The Reasonable Accommodation Requirement Lacks Any of the Characteristics of an Establishment of Religion.*

As this Court has indicated, the basic purpose of the Establishment Clause is to reinforce the principle of religious liberty in American society. *See, e.g., Everson v. Board of Education,* 330 U.S. 1 (1947). If the government supports one religion in preference to other religions or all religions in preference to no religion, it injects itself into an area of choice committed to private decision by the Constitution, an area in which the government must remain neutral. The state may not support religious activities by financial grants, *see, e.g., Everson v. Board of Education,* 330 U.S. 1 (1947); *Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), or demand that one private person support the religion of another, *see Everson supra,* or sponsor religious practices or doctrines, *see Engel v. Vitale,* 370 U.S. 421 (1962); *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963); *Epperson v. Arkansas,* 393 U.S. 97 (1968), because such involvements, although not ecclesiastical establishments in the narrow historical sense, significantly engage the government on behalf of a particular position concerning religious questions. The reasonable accommodation requirement shares none of the characteristics of those practices which have been held to violate the Establishment Clause.

a. *Reasonable accommodation produces no government support of religion.*

The religious accommodations requirement does not involve government support of religious belief in any sense forbidden by the Establishment Clause. It neither mandates direct government financial support of religion nor government compulsion that private enterprises give financial support to religion. The requirement produces no government sponsorship of particular religious views or even of religion in general. The government in no way becomes entwined in the affairs of religious organizations. All that reasonable accommodation does is eliminate practices that discriminate in effect along religious lines.

The abolition of practices that discriminate does undoubtedly provide some indirect assistance to those who would otherwise suffer discrimination, but this type of "aid" to members of particular religions is hardly support of religion in the constitutional sense. As we argue *infra,* even if this help were construed as a form of aid to religion, it would be the type that represents a permissible accommodation under the Free Exercise Clause, and would not, therefore, be forbidden by the Establishment Clause.

In the absence of reasonable accommodation, some persons will be penalized in their employment either because their religion triggers intentional discrimination or because they find the demands of their employment inconsistent with the demands of their religious beliefs. Reasonable accommodation eliminates certain adverse consequences that would otherwise result from an individual's free choice about religion. Thus, the requirement strongly promotes the constitutional value of voluntarism by permitting people to make decisions concerning religious faith without fear of crippling disadvantages in secular life. *Cf. Gillette v. United States,* 401 U.S. at 453-54.

b. *Reasonable accommodation does not infringe the religious liberty of employers or other employees or compel them to support the religion of employees for whom accommodations are made.*

Reasonable accommodation does not impair the free exercise of religion of employers or require employers to support the religion of those to whom they must make accommodations. If legislation restricted the free exercise of religion of employers, it would ob-

viously be unconstitutional. Most employers covered by the statute are corporations, but even if one focuses on individual employers, it is hard to imagine how accommodation could violate their own religious precepts. It is also hard to imagine how working a shift consistent with his own religious beliefs could violate the religious liberty of an employee who works that shift to accommodate the religious needs of another employee. No such claim of denial of religious liberty is made here.[5]

Petitioners argue that the statute requires employers to support the religion of those to whom they accommodate. This argument is also ill-founded. Without question, the Establishment Clause forecloses government requirements that one private individual or group support the religion of another.[6] But the reasonable accommodation provision is not such a requirement even when an employer must bear some cost to make a required accommodation.

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[5] When, if ever, such a claim is seriously made it will be time enough to consider the application of the statute in that context. It suffices now to point out that some employers (other than churches and other religious organizations) may conceivably think that their religious beliefs require them intentionally to discriminate on religious, or even racial, grounds; yet such a possibility has never been thought to cast constitutional doubt on statutes forbidding such discrimination. A similarly remote possibility in respect to accommodations does not cast any doubt on the constitutionality of this statutory requirement.

[6] A law that forced private payments to particular churches would be as plainly invalid as one that authorized government payments. And if an employee said he could continue working only if his employer donated $1, or $.01, a week to the employee's church, the government could not compel such an "accommodation" because to do so would be unconstitutional.

Some required accommodations will involve no cost to the employer at all. The statute might, for example, merely induce an employer to find out if another employee is willing to work at a time when one employee must abstain from work for religious reasons. An easy switch of working times may prove to be possible involving no added expense or sacrifice in efficiency. It is obviously impossible to characterize such an accommodation as support; all the employer has done is to make a simple adjustment in schedule so that an employee may follow his own religious conscience.

Some required accommodations will involve a degree of cost for the employer but cost is not identical with support. The employer is not contributing to an employee's church; he is merely making an adjustment to eliminate a conflict between religious demands and the work schedule of the employee. Reasonable accommodation does not ordinarily confer any financial benefit on the employee who needs it,[7] nor, indeed, any other benefit except the right not to work at a particular time.

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[7] Although we are aware of no such case, it is conceivable that under a given collective bargaining agreement, the employee would have to be paid at overtime rates for working an alternative time, say Sunday. Such a case would raise a somewhat more substantial question of support, though we believe the payment of overtime to the employee who seeks accommodation would not constitute a compelled support of his religion. If the constitutional question were deemed serious, however, such a case could be handled by a denial of overtime pay, based on the determination that the relevant parts of the collective bargaining agreement are against public policy in that application. Or, possibly, accommodation itself would be denied in that context as not "reasonable" or as imposing "undue hardship."

What the employer must do about practices that discriminate in effect against employees with special religious needs is essentially the same as what he must do about criteria for employment that discriminate in effect against racial minorities. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). That decision requires the formulation of criteria for hiring and advancement that do not discriminate in effect against members of a racial minority. Suppose an employer establishes that his crude test for employment quite adequately screens out all unqualified applicants, but also screens out many qualified applicants, disproportionately black. The employer further establishes that the expense of a more sophisticated screening technique to measure individual applicants fairly will not "pay for itself" in improved job performance. The decisions leave no doubt what the employer must do. *See, e.g., Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971). He must abandon his crude test, even if on balance it will cost him more to have a fairer test. The employer must accept a limited sacrifice in economic efficiency to further the statutory policy of equalizing employment opportunity.

That is precisely what the reasonable accommodation requirement demands of the employer, no more. Title VII of the 1964 act compels elimination of employment practices that discriminate in effect against groups defined in terms of race, religion, national origin, and sex. Whether the practices relate to job qualifications or work schedules is irrelevant; employers may be required to make some modifications in their chosen procedures and even bear some modest costs to assure equal employment opportunity. The cost of modifying work schedules is no more a support of the re-

ligion of individuals affected than the cost of modifying testing procedures is a support of the race of individuals affected.

Finally, it should be noted that a corporate employer may have to bear some costs to eliminate intentional religious discrimination. A large enterprise may have to spend money on supervision and review of its individual hiring practices to see that discriminatory hiring does not occur. The result of the expenditure of money is a benefit to those who would otherwise have suffered discrimination on religious grounds. If some cost to the employer combined with some benefit to the employee with special religious beliefs constitutes forbidden support of religion, then a ban on intentional discrimination would violate the Establishment Clause as much as required reasonable accommodation. Conversely, if a ban on intentional discrimination is constitutionally permissible, so also is required accommodation.

Much less is required of the employer by the reasonable accommodation requirement than was deemed acceptable in *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421 (1952). It is incontestable that an employer could no more be required to support the political party of an employee than his church; such a requirement would offend the speech clause of the first amendment. Many employers do not sympathize with the political preferences of their employees and some may not even believe in the country's basic political structure. Yet this Court upheld a state requirement that employers not only allow employees four hours to vote on election day but also compensate them for whatever portion of the working day that four-hour period included. In

considering if the state requirement was consistent with the Fourteenth Amendment, the Court did not even find it necessary to discuss First Amendment problems. If this accommodation, plus pay for no work, did not constitute forbidden compelled support of the political preferences of employees, then simple accommodation with substituted hours of work certainly does not constitute forbidden, compelled support of employees' religious preferences.

If the employer is not impermissibly being required to support the religion of the employee who receives accommodation, neither are other employees who may have to "fill in" for that employee, and who, therefore, may end up with a schedule that is slightly less preferable from their point of view than the schedule they might otherwise have had.

c. *The reasonable accommodation requirement does not constitute a forbidden preference of one religion over another or of religion over irreligion.*

Reasonable accommodation does not promote one religion at the expense of another. Since reasonable accommodation seeks to place all employees on an equal footing, it can hardly be an inducement to persons to join any particular religion. Therefore, the reasonable accommodation provision does not further religion but allows each religious sect to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). Moreover, in some settings it will be members of dominant religious groups that require accommodation rather than members of religious minorities. The benefits of the act are in no way limited to members of particular re-

ligious groups, and in areas where many stores and other enterprises are open on Sunday, the act provides considerable protection for those who worship on Sunday.

TWA argues that reasonable accommodation unduly promotes religion at the expense of irreligion, but this argument is fallacious. The EEOC has treated as an expression of religious need any belief that would qualify as "religious" under *United States v. Seeger,* 380 U.S. 163 (1965), and the plurality opinion in *Welsh v. United States,* 398 U.S. 333 (1970). EEOC Decision No. 76-104, reported at CCH EEOC Dec. ¶ 6500. Thus it has properly interpreted the Act to include claims by those who are not religious believers in the traditional sense. In at least one case, a court of appeals has actually applied the Act in favor of an atheist who complained that she was forced to participate in meetings of employees that included prayers. *Young v. Southwestern Savings and Loan Ass'n.,* 509 F.2d 140 (5th Cir. 1975). Thus, the Act involves no preference for believers over nonbelievers.

Even if the statutory requirement benefited religious believers as compared with nonbelievers, it would not constitute an impermissible preference. The state cannot support religion in preference to disbelief or indifference, *see, e.g., Everson v. Board of Education,* 330 U.S. 1 (1947); *Torcaso v. Watkins,* 367 U.S. 488 (1961), but it can make concessions to strongly held claims of religious need and religious conscience. A concession regarding employment schedules given to employees with strong religious needs would be the kind of permissible accomodation under the Free Exercise Clause this Court approved in *Zorach v. Clauson,* 343 U.S. 306 (1952), and *Wisconsin v. Yoder,*

406 U.S. 205 (1972), and which three Justices believed a sufficient basis for upholding a conscientious objector exemption they believed was framed in terms of religious belief as ordinarily understood. *See Welsh v. United States,* 398 U.S. 333, 369-74 (1970) (dissenting opinion of White, J.).

Petitioners object that Sabbatarians are treated better than persons who would like to go fishing on Saturday. It is undoubtedly true that the statute draws a line between those who have a claim of conscience not to work at a particular time and those who would prefer not to do so for other personal reasons, but that is a permissible line to draw. The reasonable accommodation requirement is like a conscientious objector provision for employment; it mediates conflicts between employment schedules and the demands of religious conscience. The EEOC regulation, which speaks of "religious needs," is not meant to require accommodation to every activity that may include some religious observance. Suppose that an employee plans a vacation trip to the Middle East, that will include his visiting the Holy Land, seeing various religious shrines, and participating in worship services. He acknowledges that from the religious point of view it is a matter of complete indifference when he takes his vacation, but entirely for reasons of personal preference, he would like to go in May. Surely the employer need not treat his request for a May vacation more favorably than a similar request from another employee just because his vacation will involve religious observance. The point of the statute is to require accommodation when special days or times are designated for religious observance or for abstention from work, or when follow-

ing the ordinary schedule of employment is otherwise inconsistent with religious conscience. The conscientious objector cases clearly establish that the government may confer relief from burdens for those who cannot conscientiously shoulder them without conferring relief on all those who desire it. No doubt, many young men would have preferred alternative service to military service, but unless they were conscientious objectors they did not qualify for the exemption. In distinguishing persons with religious claims of conscience not to work at particular times from those with reasons of another personal preference, the Act and regulation mark a line of undoubted constitutionality. *See Sherbert v. Verner,* 374 U.S. 398 (1963).

2. ***The Court Below Correctly Held That the Reasonable Accommodation Requirement Has A Clearly Secular Purpose, Has A Primary Effect That Does Not Advance or Inhibit Religion, and Does Not Involve the Government in Undue Entanglement With Religion.***

In cases involving prayers in public schools and various forms of financial relief or support for sectarian institutions, this Court has developed a threefold test of forbidden establishments, *see, e.g. Abington School Dist. v. Schempp,* 374 U.S. 203 (1963); *Walz v. Tax Commission,* 397 U.S. 664 (1970); *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The court of appeals in this case, 527 F.2d, at 43, applied the test as formulated in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-73 (1973). To be constitutional under that formulation a law (1) must reflect a clearly secular purpose, (2) must have a primary

effect that neither advances nor inhibits religion, and (3) must avoid excessive government entanglement with religion. The court of appeals correctly concluded that the religious accommodation requirement met each of the three criteria.

Given the complex interplay of constitutional values and the variety of actual holdings in religion cases, it is obvious that if any test is to prove usable for different kinds of problems, its terms must be interpreted in light of relevant values and not given a narrow and wooden interpretation. As Justice Stewart wrote for the plurality in *Meek* v. *Pittinger,* 421 U.S. 349, 359 (1975), "the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." More particularly, it cannot be true that every attempt to accommodate religion is rendered unconstitutional by the demand of the *Nyquist* standard that legislation have a primary effect that does not aid religion, since this Court has clearly indicated that some accommodations are constitutionally required by the Free Exercise Clause and others are allowable.

If the *Nyquist* test is properly understood, the statutory requirement of reasonable accommodation is valid whatever is seen as its purpose and effect. But, even if the terms of the test are interpreted in the narrow and improper way petitioners urge—one that fails to take account of permissible accommodations to the free exercise of religion—the statutory requirement still is valid. We begin with that analysis; subsequently we consider the proper interpretation of the purpose and effect test in this context.

a. *The elimination of religious discrimination is the predominant statutory purpose and is clearly secular.*

The purpose of the 1964 Act was to forbid employment discrimination of various sorts. There is apparently no dispute that the elimination of intentional discrimination on religious grounds, as well as grounds of sex, race, and national origin, is a valid secular purpose; if it were not every state and federal bar on private religious discrimination would be unconstitutional. If it is a secular purpose to prevent intentional religious discrimination, it is also a secular purpose to eliminate practices that have the effect of discriminating against members of varous religious groups even if those practices do not reflect intentional religious discrimination. Moreover, since the Act reaches practices that have the effect of disadvantaging members of other protected groups, its coverage of practices that discriminate in effect against persons with particular religious persuasions can hardly be the consequence of a forbidden purpose.

Of course, the purposes of the 1972 amendment, 42 U.S.C. § 2000e(j), have no direct relevance to this case, but even if they did, the conclusion would be the same. That amendment made specific what was already the law. The aim of Senator Randolph, the amendment's sponsor, was to make clear that employment practices that discriminate in effect against members of particular religious groups were barred by the 1964 act. *See* 118 Cong. Rec. 705-06. Suppose, however, it were somehow determined that Senator Randolph had an improper motive; that motive could hardly be subscribed to the whole Congress, especially when the amendment

was framed as a clarification of the original Act rather than an addition to it, and the amendment was introduced to the members of the Congress in those terms. If Congress's original purpose was secular, and as to that there seems no doubt, its clarification of that purpose can hardly have been other than secular.

b. *No primary effect of the statutory requirement advances or inhibits religion.*

The effect of eliminating practices that disadvantage persons of various religious persuasions is not one that advances or inhibits religion. The promotion of equal employment opportunities is secular, and it is the main effect of the reasonable accommodation provision. If the test of primary effect meant discovery of principal effect, the inquiry would be at an end, but the majority in *Nyquist,* over Justice White's dissent (413 U.S. at 823), indicated that a religious effect might be "primary" even if it were concluded that it did not predominate over secular effects. 413 U.S. at 783-84, n.39.

The effect that petitioners assert most strongly to be impermissibly religious is the advancement of the religions whose members will benefit from reasonable accommodation. We explain below why such an effect, were it a primary effect, could not be classed as unacceptably religious in this context, but even if petitioners are right about that point, their argument fails. The elimination of any practice that otherwise would discriminate against members of a particular group does, by definition, help members of that group, and in that sense helps the group itself. Surely that degree of "aid" to religious groups cannot be a primary nonsecular effect, for if it is, no ban on intentional religious discrimination is valid. The Court in *Nyquist*

acknowledged that effects advancing religion are acceptable if they are not direct and immediate. If the effect of aiding a religious group by barring discrimination against members is not itself permissibly secular, it must be indirect and remote. *See McGowan v. Maryland,* 366 U.S. 420, 450 (1961).

A ban on religious discrimination also provides "aid" in another sense. Since one's religion, unlike one's sex or race, is a matter of choice, effective penalties on certain forms of religious exercise will deter some persons, who would otherwise do so, from engaging in those forms of religious exercise, just as penalties for particular forms of political association will deter those forms of association. *See, e.g., Shelton v. Tucker,* 364 U.S. 479 (1960). It is, therefore, inevitable that relief from disadvantages otherwise attached to membership in a religious group will "aid" that group in the sense of removing one kind of barrier (though not a controlling one for most individuals) to membership and active participation. It is apparently this effect that petitioners urge is impermissible.

But if this effect is not, as we believe, permissibly secular, neither is it direct and immediate. It is the inevitable and incidental effect of equalizing opportunity for members of a group previously discriminated against when persons can by choice leave or enter the group. In this connection, it matters not whether intentional religious discrimination or practices that discriminate in effect are eliminated. Termination of previous intentional discrimination also removes a barrier to membership in the group previously suffering discrimination. If the incidental effect of "aiding" certain religious groups were to invalidate the reasonable accommodation requirement, it would also invali-

date a simple ban on intentional religious discrimination, for the effect, and its degree of immediacy and directness, is precisely the same. The unquestioned validity of a ban on intentional discrimination merely buttresses a conclusion that is otherwise apparent, that the incidental removal of one barrier to active involvement in certain religious groups may permissibly accompany the primary effect of elimination of employment practices that impose unequal burdens.[8]

c. *Even if relief of burdens on religious exercise is regarded as the purpose or a primary effect of the statutory requirement, the requirement is constitutional because this form of relief represents permissible accommodation under the Free Exercise Clause.*

Thus far, we have assumed that the purpose of relieving religious persons of burdens on their exercise of religion is not itself an appropriate secular purpose under the *Nyquist* test and that the effect of relieving such burdens would not be an appropriate effect were it a primary one. But this assumption is mistaken. Even were these the main purpose and effect, the reasonable accommodation requirement would be consti-

[8] It is argued by petitioners that reasonable accommodation requires an employer to support the religion of employees to whom he accommodates, and this might be urged to be a primary effect that is not secular. The answer is that, as we have shown above, the employer does not support anyone's religion in a constitutionally significant sense. The minimal adjustments in schedule he must make are secular effects, not proscribed religious ones.

tutional. The reason is that in some settings, including this one, it is undoubtedly a constitutionally permissible purpose and effect to relieve burdens on the free exercise of religion. In *Braunfeld v. Brown,* 366 U.S. 599 (1961), this Court clearly indicated the appropriateness of exemptions from Sunday Closing laws based on religious grounds, calling such exemptions perhaps the "wiser solution" to the burden placed on Sabbatarians, 366 U.S. at 608. There was no question that the main purpose and effect of those exemptions was to relieve burdens on the exercise of religion. In *Sherbert v. Verner,* 374 U.S. 398 (1963), this Court indicated that a state must treat a person as willing to accept suitable work for purposes of unemployment compensation even if the person refuses to work on Saturday for religious reasons, although the state was free to treat any other person who refused to work on Saturday as not willing to accept suitable work. Again, the reason was that burdens on religious exercise could appropriately be relieved, the difference from *Braunfeld* being that in this instance a majority of seven held that such relief was constitutionally compelled by the Free Exercise Clause. In the conscientious objector cases, the appropriateness of relief of burdens on religious exercise also was recognized, *see, e.g., Gillette v. United States,* 401 U.S. 437 (1971); and in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), this Court again held that an exemption from school attendance requirements for the Amish was not only allowable but compelled by the Free Exercise Clause.

Since it is evident that in all these instances the main purpose and effect of constitutionally allowable or constitutionally compelled accommodations were to relieve burdens on religious exercise, it is obvious that these

purposes and effects must be acceptable within the meaning of the *Nyquist* test if that test is truly of general applicability to establishment issues. The only alternative is to conclude that the test is not one of general application and does not reach cases of constitutionally permissible accommodation to religion.

Even cursory analysis of *Sherbert v. Verner,* 374 U.S. 398 (1963), demonstrates that in this context the purpose and effect of relieving burdens on religious exercise is contitutionally permissible. In that case seven justices held that a state must not deny unemployment benefits to someone who refused Saturday work for religious reasons, and all nine justices agreed that a state might make that choice. It would be anomalous to hold that a government must or may pay unemployment compensation to persons unwilling to work on Saturday and then to decide that the government as an employer may not make any adjustments in its own work schedule to allow such persons to work in government jobs that ordinarily involve Saturday work. Thus it may be concluded that when the government as employer provides for reasonable accommodation, as the federal government has done, *see* 5 C.F.R. § 713.204(g), that action is very likely constitutionally compelled under the Free Exercise Clause and is certainly constitutionally permissible. *Cf. Zorach v. Clauson,* 343 U.S. 306 (1952).

In terms of purpose and effect, the relief of burdens on free exercise is precisely the same whether government officers are directed to accommodate or private employers. Whatever differences there may be between the two laws, they do not lie in the impact on religious exercise of affected employees. Thus, *Sherbert v. Verner,* 374 U.S. 398 (1963), clearly establishes the appropriateness of relieving burdens on the exercise of reli-

gion in this context, and shows that a purpose and effect attack must fail even if, contrary to fact, this purpose or effect were deemed primary. Either permissible free exercise accommodations, such as this one, may constitute nonreligious purposes and effects within the meaning of *Nyquist* or that test is inapplicable to cases involving permissible accommodation.

Petitioners suggest that government regulation of private employers makes this case different for constitutional purposes from those involving governmental practices themselves; petitioners do not explain why this difference is of any constitutional significance. Certainly the Establishment Clause must be interpreted in light of free exercise values, whether government activities or private activities are regulated, and whether the Free Exercise Clause is itself a source of legislative power, as in this case, or the First Amendment stands only as a limit on the exercise of some other power. The religion provisions of the First Amendment are interpreted as a unity; thus the interplay of "no establishment" and "free exercise" values is essentially the same whether government or private action is the object of legislation.

There is no sensible basis for suggesting that the government may make reasonable accommodations to its own employees but cannot require employers affecting commerce to do the same. We have demonstrated that the purpose and effect on employees will be the same in both instances and that reasonable accommodation neither infringes the religious liberty of employers nor compels them to support any religion. As indicated in the next section, the government's entanglement with religion is actually less when it regulates

private employment than when it deals with its own employees.

d. *Reasonable accommodation does not produce excessive entanglement of government with religion.*

Under the *Nyquist* test, a law must not result in excessive entanglement of government with religion. Reasonable accommodation does require employers to respond to claims of religious need and to make appropriate adjustments. The government, through the EEOC and the courts, is ultimately responsible for resolving disputes over whether a claim of need suffices and the duty to accommodate has not been met. But this is hardly an excessive entanglement.

Most actual disputes have turned on the degree of hardship which the employer must undertake to make an accommodation; that issue does not entangle the government with religious issues at all since it concerns only how much inconvenience the employer must bear under the statute. In theory, at least, the government must also stand ready to decide if a claim of religious need is sincere and to determine if a claim for accommodation is "religious" within the statutory meaning. There will rarely be any doubt whether a claim is religious. Since religious need in this context includes the needs of nonbelievers in respect to religion, the definition of religion will not involve government scrutiny of whether an individual or group meets some narrow standard of religion. Finally, since accommodation is meant to equalize the position of employees, not to put those with religious needs in a superior position, the likelihood of fraudulent claims is remote. If the courts are ever called on to estimate

sincerity, they can do so without entangling themselves in religious doctrine.

As this Court has often recognized, *see Walz v. Tax Commission,* 397 U.S. 664 (1970), complete noninvolvement of government with religion is impossible; all that is demanded is neutrality and the avoidance of excessive entanglement. When this Court has spoken of such entanglement, it has envisioned continual government monitoring of the activities of religious institutions. *See Lemon v. Kurtzman,* 403 U.S. 602 (1971). No such monitoring is required by this statute.

Indeed the degree of government involvement with religion will almost certainly be markedly less than was required to administer the conscientious objector program. Not only did the selective service system and the courts have to define religion and draw the line between general and selective objectors in difficult cases, *see, e.g., Sicurella v. United States,* 348 U.S. 385 (1955), they had to deal with many, many cases in which sincerity was a crucial issue, since the exemption was desired strongly enough by large numbers of persons who did not qualify for it to induce them to deception. Although there may be more employees covered by Title VII than there were men processed by the Selective Service System, it seems extraordinarily unlikely that there will be so many perplexing disputes over sincerity and religious belief. Moreover, the very inquiries involved here must also be made by governments when they administer religious exemptions to Sunday Closing laws, apply the rule of *Sherbert v. Verner,* or make accommodations to work schedules to their own employees-all clearly constitutional practices. Indeed in all those instances, the need for government determination of what is religious and who is

sincere is likely to be proportionally more frequent, since government deals directly with religious claimants rather than merely reviewing unresolved disputes between such claimants and their employers, as under this statute. In sum, the reasonable accommodation required by the statute does not necessitate excessive entanglement of government with religion.

Nor does required accommodation threaten the political divisiveness along religious lines that has concerned the court in many of its discussions of entanglement, *see, e.g., Walz v. Tax Commission,* 397 U.S. 664 (1970); *Lemon v. Kurtzman,* 403 U.S. 602 (1971), *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), and which emerges as the predominant constitutional concern in Mr. Justice Brennan's concurring and dissenting opinion in *Meek v. Pittinger,* 421 U.S. 349, 373 (1975). In its long-term general effect, reasonable accommodation should reduce the divisive economic and political struggles along religious lines that the Court properly regards as a matter of great concern under the First Amendment. Rigid work schedules are an invitation to members of minority religions to organize and pressure employers for alterations or adjustments. Such pressure may be resisted by dominant religious groups whose members may perceive some benefits for themselves in the impossibility that those of minority faiths can fill particular jobs. No doubt, reasonable accommodation occasionally causes individual resentment over concessions made to employees with special religious claims. It is highly doubtful whether such resentment could lead to potential divisiveness in the relevant social and political sense; in any event, reasonable accommodation removes a much more significant source

of divisiveness by largely eliminating differing religious needs as practical determinants of employment opportunity.

II

TWA Failed To Fulfill Its Statutory Duty To Make A Reasonable Accommodation To Hardison's Religious Needs.

A. The 1967 Regulation Requiring Reasonable Accommodation Accurately Reflects Congress' Intent in Enacting Section 703(a)(1) of the Civil Rights Act of 1964.

The 1964 Civil Rights Act forbids employers from discriminating on the basis of religion in respect to hiring, discharges, and conditions and privileges of employment. 42 U.S.C. § 2000e-2(a)(1) (1974). A 1967 regulation of the Equal Employment Opportunities Commission stated that the Act places "an obligation on the part of the employers to make reasonable accommodation to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1975). Under the Commission regulation, "the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." *Ibid.*

As both lower courts in this case and virtually all other courts passing on the issue have held,[9] the regulation reflects Congress's intent in passing the 1964 Act. The reasonable accommodation requirement is needed to make effective the ban on religious discrimination. In addition, the interpretation of the agency responsible for administering the Act is entitled to considerable deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971). Furthermore, the reasonable accommodation requirement in respect to religious discrimination accords with this Court's unanimous view of what Congress provided for racial discrimination. *Griggs v. Duke Power Co., supra.* Finally, Congress has indicated unequivocally its view that the Commission had properly interpreted the Act. In response to judicial uncertainty, an amendment was proposed in 1972 that adopted almost verbatim the crucial language of the EEOC regulation. Sponsoring the amendment, Senator Randolph made it clear that the amendment merely clarified the original intention of the Civil Rights Act. 118 Cong. Rec. 705-06 (1972). The amend-

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[9] For the court of appeals cases on this point, *see Cooper* v. *General Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976); *Williams v. Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 97 S. Ct. 381 (1976); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1976); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 97 S. Ct. 342 (1976); *Young v. Southwestern Savings & Loan Ass'n.*, 509 F.2d 140 (5th Cir. 1975); *Yott v. N. American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972); *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972). *But see, Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *cert. denied* (97 S. Ct. 394 (1976); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) (dictum), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

ment was adopted unanimously by both the Senate and the House of Representatives. Given the joint force of these reasons, it is readily apparent that the 1967 regulation should be considered a proper exercise of the authority of the EEOC and an accurate statement of the law governing TWA's behavior in this case.

B. TWA Failed to Make a Reasonable Accommodation to Hardison's Religious Needs and Did Not Prove That Possible Accommodations Would Have Imposed Undue Hardship on the Conduct of Its Business.

The court of appeals properly held that TWA had neither made a reasonable accommodation to Hardison's religious needs nor demonstrated that any accommodations that it might have made would have imposed undue hardship on the conduct of its business. TWA's objections to this aspect of the court of appeals opinion seem to be three: that the court acted improperly in the scope of its review of the district court, that it incorrectly held TWA responsible for not pursuing accommodations that would have been inconsistent with the letter of the collective bargaining agreement, and that, in respect to accommodations consistent with the agreement, it interpreted the statutory requirement to impose greater burdens on employers than were actually intended. None of these objections is well taken.

Before we discuss each objection in turn, we indicate three points that are not disputed in the case and clarify a possible source of confusion about the meaning of "reasonable accommodation." First, despite TWA's statements that Hardison had actually worked on Saturdays in the previous year, and its snide reference to his wife's divorce, petitioner does not deny that Hardison made a sincere religious claim for accommodation and that the courts below were correct in assuming that Hardison's claim triggered the requirement of reasonable accommodation. Second, TWA does not argue that it could have properly discharged Hardison even if it failed to make a required reasonable accommodation. The legitimacy of his discharge unquestionably turns on whether TWA failed to meet a statutory duty that was properly imposed. Third, petitioner does not deny that if the part of the EEOC regulation requiring reasonable accommodation is valid, that part of the regulation is also valid which casts on the employer "the burden of proving that an undue hardship renders the required accommodations . . . unreasonable." That approach is consonant with the analogous treatment of discriminatory hiring practices which must be defended on the ground of "business necessity." *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Claybaugh v. Pac. N.W. Bell Telephone Co.*, 355 F. Supp. 1, 5 (D. Ore. 1973). In light of the employer's control of information about its own operations, that approach is plainly the only sensible one. TWA does not dispute this; by its silence, it concedes that it bears the burden of proving undue hardship.

The statement by the district court that TWA's efforts constituted "a reasonable accommodation," 375 F. Supp. at 889, poses the possible source of confusion about the meaning of reasonable accommodation. The statutory requirement as reflected in the EEOC regulation demands that an employer "make reasonable accommodations," that is, actually offer to an employee with a valid claim an accommodation that meets his

religious need if a reasonable accommodation exists. *See Claybaugh v. Pac. N.W. Bell Telephone Co.*, 355 F. Supp. 1, 6 (D. Ore. 1973). Hardison never was actually offered any form of relief from the conflict of his religious conscience and his scheduled Sabbath work. At the most, TWA could be said to have acquiesced in the possibility that the union might work out a swap of working times, but that did not amount to offering an accommodation to Hardison. Generally benign motives and a willingness to discuss problems and consider solutions are not themselves a reasonable accommodation, nor can they substitute for one. The best that could be said for TWA's behavior in this case is that it did not display ill will or intransigence, but neither did it offer any actual accommodation to Hardison in respect to Sabbath work nor take any steps to persuade the union to agree to accommodations supposedly varying from the terms of the collective bargaining agreement. The district court considered the actual accommodations that might have satisfied Hardison's religious need not to work on the Sabbath and concluded that each would have imposed undue hardship on TWA. Given the language of the EEOC regulation, a precise statement of the district court's conclusion and of TWA's claim here would be that no reasonable accommodation was required because any actual accommodation would have involved undue hardship. That is how the issue is impliedly cast in the main body of the district court opinion, and it is how the issue is cast in the opinion of the court of appeals, which properly concluded that there were reasonable accommodations available that would not have involved undue hardship for TWA.

1. *The Court of Appeals Acted Within the Proper Range of Its Authority in Reversing the Judgment of the District Court.*

Petitioner's argument that the court of appeals gave Hardison a "trial *de novo*" is so far out of accord with what happened it is difficult to take seriously. The issues as to which that court supplanted the judgment of the district court, *see* 527 F.2d at 39-42, were not ordinary factual issues but legal ones.

One point of difference was the legal effect of the collective bargaining agreement—the district court apparently believing that an employer could not be required to make an accommodation that would have varied from the literal terms of such an agreement, and the court of appeals taking a contrary view. The impact of such an agreement on the employer's statutory duty is indisputably a legal question, indeed a fairly important one in the interpretation of the 1964 Act. Another point of difference was the degree of hardship that the Act demands of the employer. The district court considered the Act less stringent than the court of appeals. The basic issue is what content is to be given the terms "reasonable accommodation" and "undue hardship." This issue is similar to the question of whether a certain state of facts constitutes an "unreasonable search" or an "unreasonable restraint of trade." There has been some confusion in the lower courts about how to characterize this issue, and the court of appeals here did speak of the district court's "findings" as "clearly erroneous," 527 F.2d at 37, but plainly the major questions were not ordinary factual ones. There can be no doubt that an appellate court may review and correct mistaken determinations by

the trial court of how a relevant statutory standard like "reasonable accommodation" or "undue hardship" applies to the facts the trial court has found. A third point of difference was whether TWA had produced sufficient evidence to prove undue hardship. Unquestionably an appellate court acts properly when it decides whether sufficient evidence was produced to lead a trier of fact to a particular conclusion.

The only real "fact" asserted by the court of appeals that is not to be gleaned from the district court's opinion is that the conflict between Hardison's religion and his actual schedule would end when a fellow employee with lower seniority returned from his vacation. Here the court of appeals did not deviate from what the district court said; it tried only to be more specific about what was involved. In any event, that fact is not of crucial importance either for the court of appeals opinion or for this Court's disposition of the case.

2. *TWA's Failure to Pursue Accommodations Which Were Reasonable and Would Not Have Imposed Undue Hardship Constituted a Violation of Its Statutory Duty, Even Though Those Accommodations May Have Varied From the Letter of a Collective Bargaining Agreement.*

The roles of the union and collective bargaining agreements in this statutory scheme present intricate questions that require some discussion. Fortunately, two basic principles and their application to this case can be stated rather simply at the outset. The employer and the union cannot by joint action automatically render "unreasonable" accommodations that would otherwise be eminently reasonable. If such an accommodation appears possible and the employer makes no

serious effort either to implement the accommodation on its own or to get the union to agree to do so, the employer has failed to comply with the statute.

Unions bear responsibility under the Act if they defeat reasonable accommodations between employers and employees; on this point the courts below agreed. A union has a direct duty under the Act not to classify its membership in a way that would adversely affect a person's status as an employee because of his religion. 42 U.S.C. § 2000e-2(c)(2) (1974). Although the reasonable accommodation provision of the EEOC regulation, as well as the 1972 amendment, is phrased in terms of the employer's duty to make a reasonable accommodation, it may well be that a union has a similar duty, since it is similarly barred from discriminating on religious grounds. Whatever debate there may be on this point, *see Cooper v. Gen. Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976), the statute explicitly imposes on the union a duty not "to cause an employer to discriminate" in violation of this section, 42 U.S.C. § 2000e-2(c)(3)(1974), and an employer's failure to make a reasonable accommodation is one kind of statutory violation. Thus, a union is undoubtedly liable under the Act if it causes an employer to fail to make a reasonable accommodation. In this case, the district court's entry of judgment in favor of the union is not under review, so this Court is directly concerned with union responsibility only insofar as it clarifies TWA's responsibility.

If the employer must make reasonable accommodations and the union must allow him to do so, they cannot combine by means of a broad, rigidly formulated, collective bargaining agreement to foreclose reasonable accommodations. "The rights assured by Title VII are

not rights which can be bargained away either by a union, by an employer, or by both acting in concert." *Robinson v. Lorillard Corp.,* 444 F.2d 791, 799 (4th Cir. 1971). Whatever the actual motives may have been in originally making the agreement, the employer and union must either refrain from writing provisions that would render reasonable accommodations unacceptable or they must agree to variances from the agreement when circumstances compel reasonable accommodation. As the court of appeals concluded, "a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is *prima facie* evidence of union and employer culpability under the Act." (emphasis in original).

TWA contends that insofar as the collective bargaining agreement prevented otherwise reasonable accommodations to Hardison's religious needs, such as a swap of shifts or days off, it cannot be found guilty of religious discrimination in the absence of discriminatory intent (TWA Br. 47-49). Support for this position is sought in Section 703(h) of the Civil Rights Act of 1964 which provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. * * * 42 U.S.C. § 2000e-2(h) (1974).

But that provision is not applicable to this case. Section 703(h) is merely "directed toward defining what

is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 761 (1976). In *Franks,* the Court held that a finding of discriminatory purpose was not necessary for a Title VII violation when the underlying legal wrong was effectuated by a racially discriminatory hiring system as opposed to a racially discriminatory seniority system. *Id.* at 757-58. Hardison's claim is similarly based not on a challenge to the existing seniority system but to the religiously discriminatory effects of uniform work rules. The usual standard under Section 703(a)(1) of "discrimination in effect" is applicable to this case, and a showing that TWA's work schedules have a disparate effect on employees whose religious beliefs prevent them from working one day a week is sufficient to establish a *prima facie* case of religious discrimination. *Cf. McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973).

Petitioners attempt to distinguish *Franks* by claiming that the seniority system did not "lock in" a pattern of past discrimination (TWA Br. 48, 49 n.32, Union Br. 34-35). In this case, however, the seniority system not only locked in past discrimination but constituted a significant source of present discrimination. From their very inception, the seniority provisions of the collective bargaining agreement have discriminated in effect against prospective employees of certain religions and they continue to do so. One consequence of the collective bargaining agreement is that, in all instances, employees with the lowest seniority work weekends. Thus, TWA has not hired individuals

whose religious beliefs prevent them from working on Saturday or Sunday, and many individuals with such beliefs have undoubtedly been dissuaded even from applying for jobs at the overhaul base.

Petitioners maintain that, as a matter of law, an employer is not required to make an accommodation—no matter how simple—which in any way violates the provisions of a collective bargaining agreement. The underlying assumption of this position is that seniority and other expectations created by a collective agreement are indefeasible "vested rights," not subject to modification by law. However, the decisions of this Court unquestionably establish that "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public interest." *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 778 (1976); *See also Tilton v. Missouri Pac. R. Co.,* 376 U.S. 169 (1964); *Ford Motor Co. v. Hoffman* 345 U.S. 330 (1953); *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946). The policy of nondiscrimination underlying Title VII is of the "highest priority" *Franks, supra* at 763, 779; *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 47 (1974); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). As the decision in *Franks* demonstrates, contractual expectations may be abrogated in order to further the policy against religious discrimination.

Despite petitioner's contention to the contrary, there is no doubt that Congress expected the reasonable accommodation requirement to override provisions of collective bargaining agreements that would block accommodations. In explaining the need for the reasonable accommodation amendment to Title VII, Senator Randolph noted that though Congress had intended to require reasonable accommodation in the original Act, "court decisions have clouded the matter with some uncertainty." 118 Cong. Rec. 705-06 (1972). Senator Randolph placed in the Congressional Record the decisions in *Dewey v. Reynolds Metals Co.,* 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court,* 402 U.S. 689 (1971), and *Riley* v. *Bendix Corp.,* 330 F. Supp. 583 (M.D. Fla. 1971)—both cases in which the court concluded that the employer was not required to accommodate his employee's religious needs because a collective bargaining agreement required all employees to be available for work on weekends. Congress made clear in the 1972 amendment its intention to require reasonable accommodation in situations like those in *Dewey* and *Riley.* Therefore, an employer must make a reasonable accommodation even if that action will violate a collective bargaining agreement, unless he can prove that such an accommodation will impose undue hardship on the conduct of his business.

The inflexibility of a collective bargaining agreement must be justified by substantial business necessity. *See* EEOC Dec. No. 72-2066, 4 FEP Cases 1963, 1973 CCH EEOC Decisions ¶ 6367 at 4668. TWA offers two justifications for its failure to undertake accommodations which violated the provisions of the collective bargaining agreement: 1) that had TWA arranged a swap of days off or shifts without union consent, it "could face employee morale and grievance problems" (TWA Br. 19, 58), and 2) that if TWA had to accommodate all its employees religious beliefs, "it would become impossible to schedule work" (TWA Br. 19, 59). As the court of appeals held, TWA did not produce sufficient evidence to prove that these possibilities would impose undue hardship.

TWA could have taken steps to make an accommodation without union approval. As Mr. Kussman testified, the union had no power to veto management actions (A. 148). Though no evidence of union pressure was submitted in this case, avoidance of union pressure would not constitute "a legitimate business purpose" which can justify the failure to make a reasonable accommodation. *Cf. Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (1971). The possibility of employee grievances is an equally insufficient ground for demonstrating "business necessity" or "undue hardship." Moreover, if this Court clearly establishes that an employer must make a reasonable accommodation even if that accommodation entails action which violates a collective bargaining agreement, then employees will have no basis for filing grievances against their employees when such accommodations are made.

The mere possibility of employee morale problems cannot defeat the reasonable accommodation requirement. As this Court pointed out in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 775 (1976):

> If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed. *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971).

If employee discontent becomes so pervasive that it adversely affects the employer's business, then a showing of undue hardship may be possible. A number of courts and the EEOC have required the employer to "make a persuasive showing that employee discontent will produce 'chaotic personnel problems.'" *Cummins*

v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 97 S. Ct. 342 (1976); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir., 1976),; EEOC Dec. 72-0606, CCH EEOC Dec. ¶6310, at 4555. One court has adopted a more lenient standard, requiring the employer to demonstrate that a "serious morale problem" would result. *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 516 (6th Cir. 1975), *cert. denied*, 97 S. Ct. 394 (1976). Under either standard as applied to this case, TWA has failed to satisfy its burden of proof. Hardison's problem was the first instance at the Stores Department in which an employee's religious conscience prevented him from performing assigned work duty (A. 140-41, 151). Thus, TWA has no basis in experience to support its contention that other employees would object to its accommodating Hardison's religious practices (A. 164) and has produced no concrete evidence that employee resentment would be an unmanageable problem.

TWA's claim that "chaos" would result "if all religious beliefs were accommodated" (TWA Br. 15, 59) is unsupported by any evidence. The record clearly establishes that Hardison was the only employee whose religious needs had to be accommodated (A. 140-41). No evidence was produced about other employees who would have conflicts between work schedules and religious needs or that such conflicts, if they existed, could not be comfortably accommodated. Of course, the mere hypothetical possibility, unbased in actual experience, that some employees might fabricate claims of religious need cannot provide a basis for refusing to accommodate a concededly valid claim.

Thus far we have argued that an employer and union both bear responsibility under the Act when a collec-

tive bargaining agreement is interpreted to bar reasonable accommodation. But even if there were some doubt as to whether an employer must ignore the terms of an agreement and union resistance to a variance, TWA failed to make a reasonable accommodation in this case. Together employers and unions can undoubtedly agree to variances from the terms of the collective bargaining agreement; these are within the general framework of relations covered by a collective bargaining agreement. TWA made no serious effort to get the union to agree to a variance, even though a number of variances would not seem to have posed any substantial interference with employee expectations.

TWA could have referred Hardison to the Union Relief Committee, an informal organization which worked out solutions to seniority problems in special situations (A. 130). Though the committee was run by the union, and not by TWA (A. 121), TWA did not even inform Hardison of his right to resort to the committee. Hardison testified that no one ever explained to him what the Union Relief Committee was (A. 79, 97). Though the committee generally dealt with temporary problems, the record indicates that when health or family matters were involved, TWA and the union approved permanent arrangements to allow changes in shifts or days off (A. 131, 139, 144-45). Moreover, as the court of appeals found and as we have argued, the problem of accommodating was likely not to have lasted longer than 90 days and was thus likely to be no longer in duration than problems typically handled by the Committee (A. 144). Had TWA encouraged the Union Relief Committee to do so, the Committee might well have agreed to recommend that

Hardison's religious need be treated like the special family problems it usually considered.

If TWA had urged the union to agree, the union might have accepted a voluntary swap in shifts that would have interfered with no serious expectancies. It is even possible a swap could have taken place without the slightest breach in the rigid system of seniority assignment. Hardison had told Kussman that an employee on the "graveyard" shift was willing to swap shifts with him. If no one more senior than Hardison wanted the "graveyard" shift and no one more senior than that employee wanted Hardison's shift, the swap would have been entirely consistent with seniority assignment system. But no inquiries were made to see if more senior employees wished to bid into these shifts. At the very least, the employer's duty to make a reasonable accommodation requires it to explore possibilities of accommodation with the union and to request variances from the collective bargaining agreement when they would not defeat significant expectations. Although TWA did not express opposition to a voluntary swap, neither did it in any way encourage the union to agree to such a swap.

TWA seems to imply that by moving from Building No. 1, where he had higher seniority, Hardison may have sacrificed rights to accommodation he would otherwise have had. That suggestion is plainly fallacious. Hardison moved for understandable family reasons. One purpose of the reasonable accommodation requirement is to allow employees with special religious needs to improve their employment conditions in the same manner as other employees; that is all Hardison sought to do. If accommodation would be required to a completely new employee with low seniority, plainly it cannot be withheld from Hardison because he was previ-

ously a TWA employee with higher seniority on a different job.

3. *TWA Failed to Make Accommodations Consistent with the Collective Bargaining Agreement That Were Reasonable and Were Not Shown to Involve Undue Hardship.*

There were at least two accommodations that TWA might have made without any variance in the collective bargaining agreement. TWA could have paid another employee overtime rates to cover Hardison's position, or it could have managed with one fewer than the full complement of employees during that period.

It is undisputed that the collective bargaining agreement permitted TWA to fill Hardison's job with an employee who volunteered to do overtime work. Even if it is assumed that Hardison's dilemma was not limited to a few weeks, TWA could have managed to pay overtime for one shift per week when necessary until Hardison had enough seniority to avoid any Sabbath work. If TWA had made an initial accommodation and Hardison had continued to work on the day shift, it is apparent that he would not have needed to work most Saturdays, because he had not been required to do Saturday work before his fellow employee with lower seniority went on vacation. Since Hardison had within two years of being hired acquired enough seniority at Building No. 1 to avoid Saturday work altogether, it is reasonable to assume that within a similar period he would have had enough seniority at Building No. 2 to avoid Saturday work.

By the time of his discharge, Hardison had transferred to the twilight shift which involved Friday afternoon and evening work but allowed him to have

Saturday off. Thus, he was able to work the first part of that shift himself. Moreover, Hardison testified that he intended to return to Building No. 1, where he would have acquired his old level of seniority, and that such a transfer would have been possible within a few months (A. 70-71, 110-11). However the matter is viewed, TWA would have had to pay overtime only temporarily. Although the payment of overtime undoubtedly imposes a cost on the employer, the maximum amount of overtime pay required in this case had TWA made the accommodation to Hardison's religious needs would hardly have imposed the sort of substantial cost that might constitute undue hardship on the conduct of TWA's business within the meaning of the EEOC regulation. *Ward v. Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375 (W.D. Pa. 1975).

TWA argues that had it tried to rely on voluntary overtime work, it might not have been assured of finding someone to do Hardison's job (TWA Br. 54). It seems probable that some of the more than 200 employees capable of doing Hardison's job would have wished to work overtime on an occasional or regular basis, yet no inquiries were made to ascertain possible interest; nor did TWA provide concrete evidence to show that reliance on such a volunteer was unlikely to produce willing workers or would be unsatisfactory for some other reason. It has thus fallen far short of its burden of showing that reliance on volunteer overtime workers would have imposed undue hardship on the conduct of its business.

As far as the possibility of working shorthanded during all or part of Hardison's shift, it is not disputed that TWA could have managed to have his job done. But two witnesses asserted that there would be a cost

in other job functions (A. 125, 146). The court of appeals correctly concluded that this testimony did not satisfy the company's burden of showing "undue hardship." Since it is not the law that every inconvenience is "undue hardship," *see, e.g., Cummins v. Parker Seal Co.,* 516 F.2d 544 (6th Cir., 1975), an employer must explain with some specificity exactly what sacrifice a particular accommodation would involve. Otherwise, the trier of fact is in no position to assess the degree of hardship. This is precisely the situation in this case. Such statements about other job functions hardly leave a court in a position to assess whether the inconveniences will be slight or grave. TWA was required to provide more detailed information about its operations before a court could properly conclude that being shorthanded one man for a part of one shift one day per week would impose "undue hardship." In this case, it should have been particularly easy for TWA to have provided more detailed information. After all, Hardison had actually missed three Saturdays in a row and one Friday evening. Arrangements were made to cover his position (A. 142, 162). TWA could have demonstrated precisely what adjustments had been made and why their continuation would have constituted undue hardship. Its failure to do so left it far from satisfying its burden of proving that use of a supervisor or another employee to perform Hardison's work would create undue hardship in the conduct of its business.

* * * *

In summary, TWA's position is that accommodations involving any employer cost *per se* constitute "undue hardship" and that all possible cost free accommodations were barred by the collective bargaining agreement. It must succeed on both arguments to win

the case, for if either argument is wrong, TWA improperly failed to make a reasonable accommodation. Adoption of TWA's interpretation of the reasonable accommodation requirement would turn that requirement almost into a dead letter, since the slightest business inconvenience or potential difficulty with a union would automatically amount to undue hardship. Since the requirement is a substantial one, intended to have a real effect on religious discrimination and unequal employment opportunities, TWA's interpretation of its content is wholly unacceptable. Under any proper reading of the requirement, this is not a borderline case but an obvious case. TWA failed to meet its statutory obligation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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